

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ADRIAN MORALES
Claimant

VS.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

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Docket No. 1,030,127

ORDER

Claimant requests review of the May 9, 2007 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) denied the claimant's request for temporary total disability (TTD) compensation from March 2, 2007 through April 23, 2007 pursuant to K.S.A. 44-510c(b)(2) and K.S.A. 44-510c(b)(3).

The claimant requests review of whether the ALJ exceeded her authority in denying the requested TTD benefits. Claimant argues that while work was made available to him during this period, the work exceeded the restrictions imposed by Dr. Carabetta, who was appointed by the ALJ as a neutral physician.

Respondent argues that the Board does not have jurisdiction to decide this issue and therefore the claimant's application should be denied and sanctions imposed pursuant to K.S.A. 44-536.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an

administrative law judge exceeded his or her jurisdiction.¹ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.²

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

Here, claimant maintains his restrictions were not appropriately being accommodated during the disputed period for which he seeks TTD benefits and that the work made available to him required him to bend, stoop, squat and/or crouch more than permitted by Dr. Carabetta. Following an earlier preliminary hearing, Dr. Carabetta was appointed by the ALJ as a neutral physician when there was a dispute as to whether the work provided to claimant was within his capabilities. Dr. Carabetta issued a report that limited claimant’s work activities to only occasional bending, stooping, squatting and crouching. According to claimant, the jobs that he has been asked to perform violate those restrictions and as of March 2, 2007, he was taken off work by his personal physician. When that physician’s release was not honored by respondent, this preliminary hearing followed.

Respondent counters by arguing that Dr. Whitaker, the treating physician, has determined that the claimant may return to work without restriction or limitation and is, in fact, at maximum medical improvement. Respondent further contends that Dr. Carabetta’s restrictions were apparently rejected by the ALJ as she denied claimant’s request for TTD.

After reviewing the entire record, this Board Member finds that there is no jurisdiction to hear this dispute. An ALJ has the jurisdiction and authority to consider TTD

¹ K.S.A. 44-551.

² *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

benefits at a preliminary hearing and there is nothing within this record to suggest the ALJ exceeded her jurisdiction in denying claimant's request. Therefore, the claimant's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated May 9, 2007, is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of July 2007.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

⁴ K.S.A. 44-534a.